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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Review of the Commission's
Regulations Governing Broadcast
Television Advertising

MM Docket No. 95-90

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REPLY COMMENTS OF
STATION REPRESENTATIVES ASSOCIATION, INC.

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SUMMARY

The network-rep rule and the "control of station rates" rule were adopted to promote competition in the national television advertising market and to curb network power. Competition between network and national spot advertising benefits advertisers, broadcasters, and the public. Repeal of the network-rep rule would harm competition, since many rep firms would be driven out of business. The independent rep business would be eviscerated because, as many broadcasters concluded, networks have the power to cause affiliates to switch rep firms in favor of the networks. The assertion by the networks that they lack power in the national television advertising market does not withstand scrutiny.

Programming diversity and service to community also benefit from the network-rep rule, because it ensures local broadcasters obtain objective advice on programming and business decisions. A broad number of local broadcasters attested to the vital role independent rep firms play in managing a station, and the networks fail to adequately answer this point. If the voice of independent rep firms is silenced or replaced by the network voice, then local broadcasters will lack the information they need to make independent programming decisions and instead may "play it safe" and go with the network feed.

The rules at issue here promote competition and programming diversity, two goals of the Commission. For that reason, these rules should be retained in their current form.

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**REPLY COMMENTS OF
STATION REPRESENTATIVES ASSOCIATION, INC.**

Station Representatives Association, Inc. ("SRA"), hereby respectfully submits its reply to comments submitted in response to the Commission's Notice of Proposed Rulemaking in the Matter of Review of the Commission's Regulations Governing Broadcast Television Advertising, MM Docket No. 95-90 ("Notice"). The three networks that filed comments in this proceeding have failed to produce any arguments or any evidence to support repeal of the "network control of station rates" rule and the "network-rep" rule,^{1/} whereas the comments submitted by SRA, network affiliates, and a broad group of broadcasters strongly support retention of these rules.

INTRODUCTION

The future of the independent rep business is at stake in this proceeding. As SRA submitted in its comments, and as a number of broadcasters also stated, repeal of the network-rep rule would eviscerate the independent rep

^{1/} 47 C.F.R. 73.658(h); 47 C.F.R. 73.658(i).

network-rep rule would eviscerate the independent rep business, and in the future there would be few (if any) choices available to many stations except the network-owned rep firm.^{2/} A number of commenters pointed out that the broadcasters most likely to suffer from the shrinkage in the rep industry would be small and medium-size stations,^{3/} since these stations benefit substantially from the sales and programming services of rep firms.^{4/}

Local broadcasters unanimously filed against repeal of these rules because independent reps serve two key roles for local stations: as a zealous facilitator and promoter of national spot advertising, and as a valued advisor on programming and business decisions. Those twin roles would be lost if the network-rep rule were repealed. As a consequence, local broadcasters also would lose part of their ability to serve their community and offer diverse programming.

The Commission should retain these rules because in addition to the strong arguments and evidence put forth by SRA and other commenters, the record is bare of arguments or

^{2/} See, e.g., Comments of AFLAC Broadcast Group, Inc. ("AFLAC") at 6-7.

^{3/} See, e.g., Comments of Hubbard Broadcasting, Inc. ("Hubbard") at 3-4.

^{4/} SRA has outlined in detail the nature of the independent rep business and how this business benefits small and medium-size stations by acting as an intermediary, or "market maker," between them and national advertisers. See Comments of Station Representatives Association, Inc. ("SRA") at 7-10.

business, and in the future there would be few (if any) choices available to many stations except the network-owned rep firm.^{2/} A number of commenters pointed out that the broadcasters most likely to suffer from the shrinkage in the rep industry would be small and medium-size stations,^{3/} since these stations benefit substantially from the sales and programming services of rep firms.^{4/}

Local broadcasters unanimously filed against repeal of these rules because independent reps serve two key roles for local stations: as a zealous facilitator and promoter of national spot advertising, and as a valued advisor on programming and business decisions. Those twin roles would be lost if the network-rep rule were repealed. As a consequence, local broadcasters also would lose part of their ability to serve their community and offer diverse programming.

The Commission should retain these rules because in addition to the strong arguments and evidence put forth by SRA and other commenters, the record is bare of arguments or evidence on why or how the public or advertisers or local

^{2/} See, e.g., Comments of AFLAC Broadcast Group, Inc. ("AFLAC") at 6-7.

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broadcasters would be served by repeal. The networks' only economic argument is that the Commission should define the relevant market so broadly as to include everything from an ad buy in "George," the new political magazine, to a spot on "Seinfeld," and that in this broadly defined market no one has market power. As explained in detail in the economic study prepared by MiCRA, and submitted by SRA, network advertising and national advertising compete directly, and are the closest possible substitutes for each other.^{5/} In that competitive market, networks have power and can exercise it.

The networks' only legal argument seems to be that the Golden West Policy repeal decision should be stretched and twisted to defeat any suggestion that local stations rely on independent reps for programming advice. Golden West has no relevance here since it did not address the unbearable conflict of interest a network would face in serving as a programmer seeking clearance from affiliates and as a rep firm giving programming advice to its affiliates.

Finally, the networks point to consolidation over a number of years in the independent rep business as reason why the networks should be permitted to enter the business now. This straw-man argument ignores the sound policy reason why they have been kept out of the business: If they entered, the

^{5/} SRA Comments, Attachment A ("An Economic Analysis of the Competitive Effects of Eliminating the Network Representation Rule" by MiCRA) ("MiCRA") at 3.

independent rep business would be eviscerated, and sales of all television advertising and programming advice would be concentrated in the hands of the networks. Clearly, if the Commission is concerned about industry consolidation, the last thing it should do is permit the networks to enter the independent rep business.

I. NETWORKS HAVE POWER TO EVISCERATE REP FIRMS.

As MiCRA outlined in its comments, the appropriate analytical framework for evaluating the network-rep rule is to recognize that network and national spot advertising are close substitutes for each other.^{5/} MiCRA reasoned that since a merger among all the broadcast networks and their affiliates would create an entity that could profitably raise advertising rates by a significant amount, standard antitrust analysis indicates that "network plus spot advertising comprise a product market, although not necessarily the 'smallest' possible market."^{2/}

Instead of using standard antitrust analysis, the networks tried to redefine this market by expanding it beyond

^{5/} MiCRA at 3, 4-10. Other comments reached the same conclusion. See Comments of the Broadcasters Coalition ("Broadcasters Coalition") at 9; Comments of the CBS Television Network Affiliates Association and the ABC Television Network Affiliates Association ("Affiliates") at 9; Comments of Brechner Management Company at 1; Comments of Media Access Project at 5.

^{2/} MiCRA at 3 (footnote to 1992 FTC/DOJ Merger Guidelines omitted).

its logical extreme and including in it all forms of advertising, including billboards, radio, direct mail, and magazines.^{8/} This effort to define away the problem by casting the net so wide must be rejected by the Commission.

In determining the relevant market, the Commission should analyze the potential effect of eliminating the network-rep rule using the framework for assessing the effect of a merger between two firms in closely related markets.^{9/} Using this analysis and applying it to the position of the networks, the question becomes: should the Commission be concerned if a network merged with a billboard company and controlled its rates? Or if a network merged with a direct mail firm? Clearly these mergers do not present antitrust threats. Though these are academic questions, the Commission already has confronted networks merging with or owning cable channels or radio stations. Are these markets closely related that common control raises antitrust concerns? The Commission has answered that question "No."

^{8/} CBS even refers repeatedly to its "most prominent" competitor, DBS. DBS currently has less than 1% household penetration, and there are no rational projections that suggest DBS could offer the typical national advertiser a vehicle that competes with network television.

^{9/} MICRA at 4. As MICRA explained, "Use of a framework ordinarily applied to mergers is appropriate because elimination of the Rep Rule could give one group of competitors (the networks) control over the pricing decisions of a second group of competitors (the affiliates) who compete with the networks." Id.

This analysis shows that the networks' broad definition of the relevant market cannot be sustained. However, if a network merged with its affiliates (or had a joint-representation agreement or price-setting agreement), there is little question either in the academic literature or in common sense analysis that the cost of advertising on that network's programs would increase.^{10/} The reason is that many advertisers including packaged good manufacturers and others, national beverage distributors, national restaurant chains, automobile manufacturers, cannot use magazines or radio or cable networks or billboards as effectively to reach their target audience. Broadcast television remains the primary choice for these kind of advertisers, and it comes in two flavors -- network or national spot. If one party can affect the price for these competing products, then that party can manipulate the market.

Given that the networks have power in the television advertising market, several commenters made clear that the networks would exercise that power to benefit their network-owned rep firms. The Affiliates concluded that, "[w]ithout the network representation rule, networks would be able to

^{10/} As the economists on the Commission's 1980 Network Inquiry Study later noted: "[T]he closest substitutes for within-program spots on a particular network are adjacencies on the same schedule." Stanley M. Besen, Thomas G. Krattenmaker, A. Richard Metzger, Jr. and John R. Woodbury, Misregulating Television: Network Dominance and the FCC, The University of Chicago Press (1984) at 79-80.

drive independent representatives out of business and replace them with network-owned representatives."^{11/} The Broadcasters Coalition submitted that "[a]lthough network affiliates would theoretically be free to choose representatives other than one owned by their network, in practice the networks' power would make such a choice illusory."^{12/} Other broadcasters concurred that if the network-rule were repealed, that they would be under substantial pressure to abandon the independent rep firm and switch to the network-owned rep firm.^{13/} Consequently, SRA reasserts its conclusion that repeal of the network-rep rule would eviscerate the independent rep business.

The comments also made clear that the Commission cannot rely on antitrust laws to police this threat. SRA agrees with the conclusion of the Broadcasters Coalition that the antitrust laws are not an effective substitute for the network-rep rule for a number of reasons, not least of which is the reluctance of an affiliate to sue a network, given the dependent relationship of affiliates to networks.^{14/} SRA concurs with the assessment of the Media Access Project that

^{11/} Affiliates at 3.

^{12/} Broadcasters Coalition at 7.

^{13/} See, e.g., Brechner Management Company at 2; Hubbard at 3; Comments of Meredith Corporation ("Meredith") at 3-4; Comments in Opposition of Pappas Stations Partnership ("Pappas") at 5.

^{14/} Broadcasters Coalition at 14.

case-by-case enforcement of antitrust laws is not as effective as a bright-line rule.^{15/}

Implicitly conceding that networks have substantial power over affiliates, the networks argue that their entry in the rep business would nevertheless be beneficial because the rep business has become more concentrated over the years. Though it is true that the number of independent rep firms has shrunk over the last several years, that shrinkage reflects the thin profit margins that characterize the rep business, as well as the substantial costs for economic and program research rep firms undertake in order to service their stations effectively.

The fact that the rep business has shrunk somewhat over the years does not mean, however, that the networks should be allowed to enter the independent rep business and thereby *guarantee* dangerous concentration of the business. The current rep business, with however many firms, provides independent programming advice. In addition, each of the local broadcasters submitting comments confirmed that if the networks could enter the rep business, independent reps would be driven out, and sales of all television advertising would be concentrated in the hands of the networks. Clearly, if the Commission is concerned about industry consolidation, the last

^{15/} Comments of Media Access Project at 11. This conclusion is buttressed by the fact that cost of enforcement is nil and the benefit to the public is substantial.

thing it should do is permit the networks to enter the independent rep business.

II. REPEAL WOULD ADVERSELY AFFECT DIVERSITY.

SRA agrees with the comments from all the local broadcasters that independent reps play a key role as program advisor to local stations, and that this role would be lost if networks take over the rep business.^{16/} Loss of this role would have a devastating impact on service to the community and program diversity.

SRA agrees with Hubbard, which stated that the Commission's objective of diversity in programming will be adversely affected if the network-rep rule were repealed, since the networks will work hard to ensure nationwide clearances and avoid preemptions.^{17/} The Affiliates asserted that since repeal would drive out independent reps, dependence on network-owned rep firms would result in reduced programming independence.^{18/} And the Broadcasters Coalition stated that elimination of the rule would undermine localism. The reason: a network's advice as a rep firm "inevitably would be colored by its primary role as a network program provider."^{19/}

^{16/} See e.g., AFLAC at 7-8.

^{17/} Hubbard at 4.

^{18/} Affiliates at 3.

^{19/} Broadcasters Coalition at 10.

To answer this point, CBS and CapCities pointed to the Commission's Golden West Policy repeal decision for the proposition that local stations control program decisions, and therefore the Commission should ignore the influence question.^{20/} Licensees are required to maintain "control" over program decisions, and rep firms provide advice consistent with that principle. What is at stake, instead, is the rep firm's role as an independent advisor on programming and related issues.

The Golden West Policy repeal decision is inapposite for a number of reasons. First, it should be noted that though that decision applies to television as well as radio, an analysis of the decision shows that television was at best an afterthought, and that the entire record before the Commission focused on the effect of the Golden West Policy on radio. See 87 F.C.C. 2d 668, 669.

Second, an important element in the Commission's decision was the conclusion that stations can easily change rep firms if they find they are not receiving good advice. 87 F.C.C. 2d at 680. That option would not be available to local stations, however, if (a) the network used coercive power to persuade the affiliate to switch rep firms, as so many broadcasters have asserted is likely, or (b) repeal of the

^{20/} The Notice also asks how the Commission should view the Golden West Policy repeal decision.

rule drives most independent rep firms out of the business, which SRA and many broadcasters are convinced will happen.

Finally, there was no network-affiliate issue in Golden West; the Commission focused on the station-rep relationship. Thus, the potential conflict at issue in Golden West was theoretical and attenuated. By contrast, the powerful conflicts of interest networks would face in offering programming advice and seeking nationwide clearance of their own programs would be insurmountable. The struggle between affiliates and networks over programming decisions is well documented, and evidence for it can be found in recent affiliation agreements^{21/} and in all the comments from local broadcasters.^{22/} Because of independent reps, local stations today have the information and, when appropriate, independent advice to make programming decisions and preempt network programming. The Commission can be reasonably certain that no network-owned rep firm would advise preemption of network programming.

For these reasons, SRA agrees with the conclusion of Meredith that "Golden West has no relevance to this proceeding" and that the Commission must weigh heavily the

^{21/} See Broadcasters Coalition at 11.

^{22/} See, e.g., Comments of MAC America Communications, Inc. at 1-2 ("the networks have increasingly sought in recent years, through creative disincentives written into affiliation agreements, to make it all but impossible for affiliates to exercise independent judgment about network programming"); see also AFLAC at 3; Pappas at 3-5.

effect that repeal of the network-rep rule would have on programming diversity.^{23/}

III. THE "CONTROL OF STATION RATES" RULE AND THE NETWORK-REP RULE CONTINUE TO SERVE THE PUBLIC INTEREST.

A. Repeal Of The "Control Of Station Rates" Rule Cannot Be Justified.

No evidence or arguments have been put forth by the networks to justify repeal of the "control of station rates" rule. CBS viewed repeal of the rule as an academic exercise, and chose not to comment on it. NBC and CapCities merely asserted that since the relevant market includes everything from a newspaper or magazine ad to prime time television, no one has market power and thus any prices above competitive levels will not stick. But as discussed above, the market definition suggested by the networks fails antitrust scrutiny, and MiCRA's analysis shows that network and national spot advertising are the closest possible substitutes, and thus could be subject to collusive pricing.^{24/}

Local broadcaster comments expressed support for this rule, because of the continued danger of network manipulation of spot prices.^{25/} The Commission must be skeptical of a proposal to let one party dictate the prices of its only competitor. In the end, price fixing cannot be

^{23/} Meredith at 5.

^{24/} MiCRA at 3-8.

^{25/} See, e.g., Broadcasters Coalition at 3-4; Meredith at 3.

justified. Consequently, the rule should be retained for the benefit of advertisers, broadcasters, and the public.

B. The Network-Rep Rule Continues To Serve The Public Interest.

As SRA set forth in its comments, the network-rep rule benefits advertisers, broadcasters, and the public by promoting competition between network advertising and national spot advertising. Independent rep firms make that competition possible by acting as the intermediary, the "market maker," in putting together national advertisers and local stations, including small and medium-size stations, across the country. The fact that independent rep firms have put together "unwired networks" to compete directly with network advertising,^{26/} while the networks are using satellite distribution systems to provide cluster spot sales in dozens of regions throughout the country in competition with national spot advertising,^{27/} should give the Commission comfort that competition is alive and well in the national television advertising market. This competition ultimately benefits the public, since it offers advertisers competing vehicles on price and quality for targeting their sales pitch.

^{26/} An "unwired network" is a group of stations assembled by an independent rep firm that enables a national advertiser to approximate a network buy. See SRA at 11-13; MiCRA at 8-10.

^{27/} See Pappas at 4.

This head-to-head competition between national spot and network advertising promotes a number of Commission goals. The network-rep rule makes that competition possible.^{28/} Repeal will mean the end of vigorous head-to-head competition, and compromise of the Commission's goals of promoting competition and diversity. If the Commission seeks to encourage that kind of competition, then it should retain the rule as currently written.


^{28/} See MiCRA at 9-10.

CONCLUSION

For all the reasons stated herein, the Station Representatives Association urges that the network-rep rule and the "network control of station rates" rule be retained in their current form.

Respectfully submitted,

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